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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 960

JOYCE FARNADY LUCAS,

Petitioner,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, A FOREIGN CORPORATION, GERALD DALE DAVIS AND MARILYN J. DAVIS,

Respondents.

REPLY TO BRIEF OF THE RESPONDENTS.

CHARLES SAGGIO,
324 East Wisconsin Avenue,
Milwaukee 2, Wisconsin,
Attorney for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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JURISDICTION.

On pages 42-44, Appendix B, Exhibit No. 6, are petitioner's documents in the trial court raising the question of the violation of petitioner's rights under the United States Constitution Amendment, Article VII. Said appendix at p. 46, discloses the trial court's refusal to pass on said issue; Appendix B, Exhibit No. 1, at p. 22, the State Supreme Court's decision:

> "Plaintiff raises a question whether her rights under the United States Constitution have been violated by the trial court's action on the jury verdict. It happens that, in form, the trial court did order a change in the amount of the award made by the jury. In substance, however, the trial court gave plaintiff the choice be-

> tween a new trial and accepting the court-determined figure. Plaintiff was free to have a second jury make an award if she so desired. No right of plaintiff to trial by the jury was violated by the judge's determining that $4,200.00 was a fair award because plaintiff was free to reject it. Plaintiff was deprived of the award made by one jury, * * *"

It is submitted that the Court's action denying judgment for a full verdict, but permitting judgment for a smaller amount is a taking of a property right embraced in the 14th Amendment of the United States Constitution, and if the State Supreme Court mentions that phase of the case in its decision, it must have been considered before the time of the petition for rehearing.

It is felt that jurisdiction is well established on the basis of a denial of rights under Amendment VII to the United States Constitution together with the effect the state courts give to Wisconsin Statute 270.49 which denies a litigant his said rights, not only through a process of passing on credibility of witnesses and weight and inferences of the testimony, but also by the courts making their own medical conclusions which are contrary to the evidence. This last statement is not intended to be argumentative, nor does petitioner hope that the United States Supreme Court divert the energies demanded by its work in order to review the facts in this case. The state court's personal medical conclusions are self-evident in the decisions. The trial court's decision makes these statements (Appendix at p. 41):

> "She has two small scars in her scalp, which are well covered when her hair are combed over it. She is young; has married since the collision * * * she had no appearance of being nervous or in a state of anxiety at the trial; whether or not she has headaches from these injuries was not apparent, and, if so, those are subjective * * *"

Such a statement cannot cover up the fact that there was testimony in the case relating to the effects of injury in the nature of petitioner's concern over visible scars and loss of hair, that she developed nervousness and anxiety and that there is evidence relating to complaints of headaches, even though they are subjective and not apparent; this little quote discloses there is some evidence, at least, that somewhere in the record evidence of objective symptoms to support the subjective complaints. It seems that the court is arbitrarily looking for a means to modify the verdict.

The State Supreme Court approved such medical conclusion by the trial court, when it stated (Appendix B, at p. 21):

> "The trial court has an advantage * * * in that he not only sees and hears the testimony, but he also has the same opportunity to observe the injured person * * *"

At page 39 of appendix the trial court states that the neurological examination performed a year after the collision by Dr. Evans, at respondents' request, showed that she had normal neurological findings; this conclusion has no foundation in the evidence. Dr. Evans testified (R. p. 164):

> "* * * I did a neurological * * * The deep tendon reflexes are all markedly hyperactive * * * there is tension in the neck muscles and there is tenderness * * * over the interspinatus muscle, up and down the back * * * These hyperactive reflexes are both muscle and nerve reactions * * * The control center of the deep tendon reflexes are along the course of the spine * * * to the brain * * *"

Dr. Ullrich, who is quoted by the trial court as having made negative findings, for respondents testified to the contrary as follows (R. p. 157):

> "* * * I had no way of knowing from the history

> at this point. The significance of these would have to be correlated with other studies in further examination * * * There was material I did receive which would change my opinion as to my findings relative to my examination * * * and that is the cervical spine suddenly straightened * * * due to soft tissue spasm * * * and this may correlate with the patient's complaint of the neck pain that she had, though it was absent at the time I had seen her * * * she was concerned about headaches and the tenderness on the scalp * * * (R. p. 158) * * * if neck swelling is present * * * that would be evidence of * * * bleeding * * * in the neck * * * caused by tissue injury * * * a scar is formed * * * a person who once had his neck injured is susceptible to re-injury or pain * * * this patient could be examined later and show a hyperactive reflex * * *"

It would seem that the courts in Wisconsin place common law actions in the same category as cases where by statute there is liability without fault, the determination of which is by a legislative body. The courts in Wisconsin are now exercising even a greater power than that which was criticized in *Sentiles* v. *Inter-Caribbean Corp.*, 361 U. S. 107, 108-111; in which Mr. Justice Brennan stated that the jury, not the medical witnesses, were sworn to make a legal determination on a medical issue. Since the decision in *Powers* v. *Allstate et al.*, 10 Wis. (2d) 78, the Wisconsin courts have consistently determined medical issues in disregard of the evidence the jury had for its consideration; in the instant case, the Wisconsin Supreme Court stated that the trial court considered all of the evidence the jury was entitled to consider (Appendix B, Exhibit 1, at p. 21).

The loss of rights preserved by the United States Constitution were sufficiently presented in the state courts prior to petitioning for rehearing. Jurisdiction has been established. The only remaining point is whether the United States Supreme Court can look beyond the fact

that this is a common law personal injury case to consider the loss of rights to all litigants in Wisconsin as well as other parts of the country that may have followed *Powers v. Allstate et al.*, 10 Wis. (2d) 78, which extend to the questions of causation and liability as well as damages. These cases are stated in this brief.

RESPONDENTS' STATEMENT OF "QUESTION PRESENTED" IS IMPROPER.

Respondents' purported question has no place or position in this review. Their question is argumentative, and it states conclusions and assumptions which the petition itself seeks to have answered.

There is nothing in the petition to suggest that review is sought of an individualized personal injury case based on the appreciation or sufficiency of evidence or a court's meaningful judicial supervision of a jury verdict.

Review is sought because Wisconsin courts are persistently disregarding credible testimony in jury cases and are applying their own conclusions, passing on the credibility of witnesses, the weight of the evidence and inferences therefrom as a means to defeat a verdict in cases where the court has declared there is a factual basis for the verdict that there is no error in the trial, nor bias or prejudice by the jury, nor perversity in the verdict. It seems that jury trials have been reduced to a mere formality, the preservation of which is recognized only by giving the litigant an option to have another jury trial, if modification is declined, without explanation whether another jury trial is needed to prove or disprove the correctness of the court's conclusions.

The questions presented by petitioner involve the right of trial by jury, equal protection of the laws and denial of the right of property, all preserved by the United States

Constitution and the common law. The citizens of the state of Wisconsin as well as those in the states that have adopted *Powers* v. *Allstate, et al.*, 10 Wis. (2d) 78, are denied these rights.

RIGHT OF JURY TRIAL, EQUAL PROTECTION OF LAWS AND RIGHT OF PROPERTY PERSISTENTLY DENIED.

The cases showing persistent loss of rights were not detailed in the petition in order to achieve brevity. They are set out here because respondents' brief, page 3, second last paragraph, states that there is no foundation for the statement.

Petitioner's attorney had the *Powers* case; review was not there sought to the United States Supreme Court because a federal question was not timely raised.

The *Powers* case was appealed to the state supreme court only to determine whether there was evidence to support a jury's finding of permanent injury. The state supreme court stated there was such evidence. It then stated that the members of that court had talked to lawyers and trial judges who were in favor of the court's adoption of discretionary powers to modify verdicts rendered by the jury in fair trials (Appendix pp. 58-59), so the court overruled Wisconsin decisions which stated such action was repugnant to the United States Constitution, and adopted such power. However, in searching the record to determine what the modification should be, it discredited plaintiff's physician's credible testimony that removal of plaintiff's torn knee cartilage would cause the bones to approximate each other and would cause certain therein described complications and selected the testimony of defendant's medical witness who in a general way stated that many athletes have that cartilage removed and are able to con-

tinue in their sports, and made the modification on that basis (Appendix pp. 52-57).

Such action has since not only encouraged the trial courts to select evidence, but they have made their own medical conclusions or the courts have permitted evidence by the defense pertaining to parts of the body which received no injury and used such negative testimony as a basis for modifying the verdict, as follows:

Garcia v. *Samson's Inc.*, 10 Wis. (2nd) 515. A pregnant lady suffering from heart trouble was assaulted. There was testimony that the assault and battery aggravated the heart condition and a Caesarian section had to be performed. No claim was made that her feet, legs, abdomen, neck and forehead were injured. In overlooking the effect of the assault to her total person, the trial court set aside the award and stated, with the appellate court's approval:

> "The only objective findings by the doctors were some scratches on her forearms * * * the doctor found no marks on her forehead, neck, shoulders, back, abdomen, legs or feet * * *"

Mankowski v. *Ehlenbach*, 11 Wis. (2nd) 38, the state supreme court approved the trial court's reduction of a $2,000.00 award to $1,000.00 because the court felt plaintiff's facial scars were not serious.

Beijer v. *Beijer*, 11 Wis. (2nd) 207. A $4,000.00 award for injury to the flexor and extension muscles resulting in permanent limitation of hand motion and weakness of grip and reduced ability to work was modified to $3,000.00 because, stated the court, the thumb and the middle finger were normal.

Burmek v. *Miller Brewing Co.*, 12 Wis. (2nd) 205; $42,000.00 to $30,000.00.

Dykstra v. *Cudahy Bros.*, 13 Wis. (2nd) 275, $20,000.00 set aside because defendant's doctor testified that effects claimed to be caused by injury could result without injury.

Jennings v. *Safeguard*, 13 Wis. (2nd) 427, $1,000.00 award set aside because police officer who investigated collision testified he had no notation in his investigation report of plaintiff claiming injury; had plaintiff told officer at scene of collision that he was injured, the officer would have entered such a notation in his book.

Mayville v. *Heart*, 14 Wis. (2nd) 292, $25,000.00 for severely fractured ankle and lacerated sphincter mechanism set aside as excessive.

Delong v. *Sagsetter*, 16 Wis. (2nd) 390, $25,000.00 for loss of eye, fracture of clavicle, broken kneecap, internal injuries, head, neck, back and teeth injury, reduced to $15,000.00 by trial court.

Egstrom v. *Dewitz*, 18 Wis. (2nd) 421, $27,000.00 reduced to $4,000.00 after both courts stated there was testimony relating to permanent abnormal back condition, but held such testimony did not support the verdict.

Fizeuen v. *Brenner*, 16 Wis. (2nd) 445. After reviewing medical testimony, court stated $40,000.00 was excessive by $30,000.00 because plaintiff had previous injuries.

Bublitz v. *Lindstrom*, 17 Wis. (2nd) 608. $45,000.00 verdict set aside because defendant's medical witness testified he believed plaintiff had recovered from the effects of injury; that the loss of hearing was unrelated, and there was a dispute over an x-ray interpretation.

Jansa v. *Mil. Auto etc.*, 17 Wis. (2nd) 145. Trial Court made its own findings as to medical conclusions in setting aside a verdict.

Mutas v. *Inland Construction Co.*, 19 Wis. (2nd) 194. Plaintiff's award for injuries resulting from fall on patch

of ice was reversed because he failed to make a more minute inspection for this ice before he took the next step. There was evidence that the patch of ice was indistinguishable and his use of the premises was the same as that of the great mass of people under similar circumstance.

Other cases in which evidence was overlooked, reweighed and credibility was considered by the court in changing the jury finding are: *Rud* v. *McManera*, 10 Wis. (2nd) 41, *Pastor* v. *Mut. Auto Ins. Co.*, 10 Wis. (2nd) 314, *Gilbert* v. *Reid*, 10 Wis. (2nd) 398, *Bembinster* v. *Aero Auto Parts*, 12 Wis. (2nd) 252, *Cary* v. *Klobunde*, 12 Wis. (2nd) 267, *Nessler* v. *Nowicki*, 12 Wis. (2nd) 421, *Wellman* v. *Moes*, 13 Wis. (2nd) 18, *Struppus* v. *Farmers Mut.*, 14 Wis. (2nd) 158, *Kincaide* v. *Hardware Mut. Cas. Co.*, 15 Wis. (2nd) 474, *Raim* v. *Ventura*, 16 Wis. (2nd) 67, *Magin* v. *Bemis*, 17 Wis. (2nd) 192, *Sell* v. *Mil. Auto*, 17 Wis. (2nd) 510, *Wolfe* v. *Oliver Const. Co.*, 16 Wis. (2nd) 337, *Templeton* v. *Crull*, 16 Wis. (2nd) 416, *Baker* v. *Herman Mut. Ins.*, 17 Wis. (2nd) 597, *Lee* v. *Junkans*, 17 Wis. (2nd) 56, *Theisen* v. *Mil. Mut. Auto Inc.*, 17 Wis. (2nd) 91

PETITIONER'S CORRECTION OF RESPONDENTS' QUOTATIONS.

After the trial court passed on the question of liability wherein it stated:

> "It would serve no useful purpose to review the evidence * * * Suffice it to say there is sufficient evidence * * *"

the trial court went on to say:

> "It cannot be said that the other answers to the questions sought to be changed or stricken are clearly contrary to the evidence or contrary to any inference which the jury could fairly draw from the evidence * * *"

This statement appears in the Appendix on page 36; Respondents' quote appears on page 35 of the Appendix.

Respondents' motions after verdict were requests only to dismiss the action on the grounds there was no evidence to support the jury's finding of liability, and, in the alternative, for a new trial because of an excessive verdict and for error; they also had a second alternative request to reduce damages to an amount an unprejudiced jury would award. No complaint was made as to lack of evidence relating to damages (Appendix, p. 30). All of respondents' motions were denied (Appendix, p. 35). Almost every page of the trial and appellate courts' decisions refer to some of the evidence relating to petitioner's injuries. All of these statements by the courts should justify petitioner's statement that the jury's findings have a basis in the evidence and that the court so held.

REASONS FOR GRANTING WRIT.

The atmosphere in which the state courts' opinions are written intend to leave one to believe they are based on all the evidence which the jury had for its consideration, yet the opinions themselves indicate the courts have avoided a good deal of the evidence and otherwise set forth their own conclusions merely for the purpose of changing the jury finding so that judgment rests on the discretionary view given the case by the courts rather than on the evidence. This is done in the name of discretionary power in a court to declare damages excessive in cases where there has been a fair trial and a basis in the evidence for the jury's findings.

The common law cases relied on by the Wisconsin courts and respondents are not authority for such power. They apply the opinions in those cases without regard to the facts on which they are based, *Doyle* v. *Continental Ins.*

Co., 94 U. S. 535, 34 L. Ed. 148. The cases on which they rely are distinguishable in these respects:

1. Some of them involve material things in which damages can be calculated in order to ascertain excessiveness.
2. Other cases involve damage issues in which reasonable minds can reach different conclusions and their excessiveness can be determined as resulting from error, no basis in the evidence, prejudice, bias or perversity. In other words, there has not been a fair trial.
3. A holding that remittitur or option of new trial is not a denial of right to jury trial relates to defendant who is asked to give up nothing and his obligation has been reduced by the court.

In *Powers* v. *Allstate et al.*, 10 Wis. (2nd) 78, in which the Wisconsin Supreme Court decreed unto itself and all the Wisconsin courts the power to declare verdicts excessive in cases where there has been a fair trial, it failed to distinguish that *Arkansas Valley Land and Cattle Co.* v. *Mann*, 130 U. S. 69, declared that defendant, whose obligation was reduced, lost no right to jury trial, and Wisconsin applied that rule in plaintiff's circumstance who did give up some right of recovery; the Wisconsin court made no distinction as to the type of damage issue involved along with a question of whether there was error.

If Wisconsin is permitted to declare a verdict excessive where there has been a fair trial in which there is no basis, such as error etc. for declaring a verdict excessive, no case can escape modification, especially if a case is assigned to a court where the fluctuating barometer of value is low, or to one where the appreciation of another's suffering is not perceived.

Petitioner has found no authority for a court's power to declare a verdict excessive on the basis of a court's own conclusion of medical facts in disregard of evidence or by reweighing evidence or by passing on the credibility of witnesses where there has been a fair trial and a basis in the evidence for a damage issue in which reasonable minds can reach different conclusions. *Enterprise Irrig. Dist.* v. *Farmers Mut.*, 243 U. S. 157. The state court has departed from the accepted and usual course of judicial proceedings. It has decided Federal questions of importance in a way not applicable to the decisions of the United States Supreme Court. Principles are invoked the settlement of which is important to the public, *Dimmick* v. *Schiedt*, 293 U. S. 474, 486:

> "Maintenance of a jury as a fact finding body is of such importance so firm a place in our history * * * that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost of care * * *"

CONCLUSION.

Petitioner respectfully submits that the decisions of the trial and the Supreme Court of the State of Wisconsin are not in accord with applicable decisions of the United States Supreme Court, and that an option for another jury trial is not a preservation but a denial of right to trial by jury which jeopardizes petitioner's rights because of loss of recovery of jury's damages along with a probable inability to go through another trial due to circumstances such as loss of witnesses and there is no particular purpose stated for requiring another trial except for damages which again can be modified by the court.

Respectfully submitted,

CHARLES SAGGIO,
Attorney for Petitioner.

Dated May 9, 1963.